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Supreme Court of the United States

October Term, 1948

No.....

ED THYS and ALBERT K. MILLER, co-partners doing business as THYS & MILLER,

Petitioners,

vs.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND BRIEF IN SUPPORT OF PETITION

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Supreme Court of the United States

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No.....

ED THYS and ALBERT K. MILLER, co-partners doing business as THYS & MILLER,

Petitioners,

vs.

THE STATE OF WASHINGTON,

Respondent.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Ed. Thys and Albert K. Miller, co-ners doing business as Thys & Miller, pray that a of certiorari issue to review the judgment of the reme Court of the State of Washington entered in the ve entitled cause on December 13, 1948 (R. 138-9), tion for rehearing denied December 13, 1948 (R. 138), ersing the judgment of the Superior Court of the State Vashington for Thurston County. (R. 79).

STATEMENT OF THE CASE

The primary issue in this proceeding is the question he legality and constitutionality of state sales taxes business and occupation taxes imposed by respondent,

the State of Washington, upon petitioners, Thys & Miller, in certain interstate commerce transactions involving patent royalties on hop picking machines.

Petitioners as plaintiffs filed in the Superior Court of Thurston County, Washington, two notices of appeal and complaints, later consolidated for all purposes, contesting the legality and constitutionality of two tax assessments for the years 1941 through 1944, both inclusive, and certain orders and decisions of the Tax Commission of the State of Washington. Petitioners paid under protest the two assessments, $3,080.37 and $11,772.43 respectively, and sued for refund and for an adjudication of illegality. (R. 65-73). Much larger amounts for future years are indirectly involved.

After a non-jury trial, the court entered judgment in favor of petitioners. (R. 79-81). Upon appeal by the State, the State Supreme Court reversed, and held that the taxes in question were lawfully assessed, three judges vigorously dissenting. (R. 103-138).

The material portions of the state tax statute, namely, Titles II and III of the Revenue Act of 1935 (chap. 180) as amended (Remington's Revised Statutes of Washington, sec. 8370-4 to 8370-25, and 8370-199, as amended) are quoted in the appendix to our brief.

The facts are for the most part substantially undisputed and may be briefly summarized as follows:

Petitioners, Thys & Miller, have, at all times material, resided at Sacramento, California, and have their sole office and manufacturing plant there. They have never had a place of business anywhere else. They have never had an office nor place of business of any nature whatever, nor any stock of merchandise, nor any authorized agent or employee in the State of Washington. (R. 16, 17, 20, 37, 44-5, 85, 89, 93, 95).

Petitioner, Ed. Thys, is an inventor. As a result of a tremendous amount of labor and research performed in California, he has invented and obtained U. S. patents on numerous improvements in hop picking machines. (R. 20, 31).

Due partially to the acute labor shortage caused by the war, a considerable number of hop picking machines containing petitioner's patented improvements have been used by hop growers in the State of Washington during the past several years.

Accordingly, petitioners in California entered into a written contract with Lindeman Power Equipment Company, a corporation, of Yakima, Washington, for the manufacture of these machines. Petitioners made occasional inspection trips to Yakima, but reserved no right of con-

trol and exercised no control whatever over the operation of the Lindeman plant or the manufacture of the machines. No Lindeman representative ever had any authority to sign any contract for petitioners. (R. 30, 34, 43-4, 93). The relationship was clearly that of independent contractors. (R. 20-1, 30, 34-5, 43-6, 49, 89, 91-2; Pltf. Ex. 9).

No sales solicitation was necessary and none was made for the reason that Yakima hop growers quickly became familiar with Thys machines, and their demand therefor at all times greatly exceeded the available supply thereof. This again was caused partially by the acute shortage of both labor and materials due to the war. (R. 32-3, 92, 95-6, 99, 100, 102).

Petitioners in California entered into a written contract, dual in nature, with each machine purchaser. Each contract provided: (1) for the sale of the picking machine from petitioners to the purchaser for a certain stated purchase price (varying through the years from $5,000.00 to $6,350.00—which included the cost of manufacture plus a profit margin).

Each contract also provided: (2) that petitioners granted a license to the purchaser to use any or all of petitioners' inventions, listing the patents thereon, in consideration of which the purchaser agreed to pay petitioners an annual royalty for a period of 17 years at rates varying

from $5.00 to later $3.00 per 200 pound bale of hops picked with the machine. (R. 20-1, 44, 86, 93; Pltf. Ex. 8).

Paragraph 6 of the contract (Pltf. Ex. 8; petitioners being first party and the purchaser, second party) reads in part as follows:

> "It is expressly understood that the sale of said machines is without the right to use said machines, and that in order to use said machines Second Party must secure from First Party a license to use said machines, and that the continuing right to use said machines is strictly conditioned upon the full and faithful performance of such license; wherefore, First Party hereby grants to Second Party a non-exclusive, indivisible and non-transferable license, as long as the terms hereof be fully and faithfully performed and maintained, to use said machines, for the purpose for which said machines were designed, under the following United States Letters Patent: . . . ,"

followed by a description of the patents pursuant to which the machine was made and sold.

By paragraph 7, petitioners granted to the purchaser,

> ". . . strictly subject to the full and faithful performance of the terms and all thereof of this agreement, a non-exclusive, indivisible and non-transferable license to use and enjoy, in connection with hop picking and separating operations of Second Party, the methods and processes disclosed and claimed in United States Letters Patent (describing the patents)."

Paragraph 8 of the contract reads, in part, as follows:

> "For and in consideration of the licenses and each there-

of, set forth in Paragraphs VI and VII hereinabove, Second Party agrees to pay to First Party a royalty of Five Dollars ($5) per two hundred (200) pounds of dried hops harvested by machines purchased by Second Party, said royalty being payable when the amount of bales picked is determined or on or before the 15th day of October of each year during the term hereof, for all hops harvested during the preceding twelve (12) calendar months. In any event, the minimum royalty payable hereunder shall be Five Hundred Dollars ($500) per machine per annum, and if the royalties computed at the rate of Five Dollars ($5) per two hundred (200) pounds of hops harvested shall not aggregate as much as Five Hundred Dollars ($500) for each machine in each period of twelve (12) months herein referred to, said sum of Five Hundred Dollars ($500) per machine shall nevertheless be paid to First Party by the following October 15th."

In all cases the purchase price was fully paid and title to the machine passed to the purchaser either prior to or at the time of delivery of the machine, and each contract so provided. (R. 21-3, 44; Pltf. Ex. 8).

There is no evidence whatever impugning in any manner the good faith of petitioners, nor showing any fraudulent intent to evade, nor indicating that these contracts were anything but what they purported to be. On the contrary the evidence establishes petitioners' entire good faith in these transactions. (R. 23).

It is undisputed that the business and occupation tax for manufacturing and the sales tax for the purchase price of the machines, whether actually taxable or not, have been

fully paid. The sole controversy relates to the taxability of the patent royalties under title II, the ¼% occupation tax, and title III, the 3% sales tax. (R. 9, 21-2, 23-4, 39, 41, 48, 93-4).

These were bona fide patent royalties and were never intended as part of the selling price of the machines. (R. 21, 23, 44, 98).

Petitioners shipped from their plant in Sacramento, California, to Lindeman at Yakima, Washington, huge quantities of parts which became component parts (more than 15%) of the completed machines. (R. 14-6, 29, 33, 36-7, 39-42, 47, 88, 91-2).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment here in question by writ of certiorari, pursuant to title 28, U. S. Code, sec. 1257, and particularly paragraph (3). As construed and applied herein by the state supreme court the state tax statute in question is invalid, unlawful, and unconstitutional because repugnant to the Commerce Clause of the Constitution (Art. I, sec. 8, clause 3) and the Due Process Clause of the Fourteenth Amendment, and also the Patent Clause of the Constitution (Art. I, sec. 8, clause 8), and the federal patent statutes.

Also and in any event, the rights, privileges and im-

munities of the petitioners claimed under the said three constitutional provisions and laws are violated by the said state supreme court decision and judgment.

The judgment of the state supreme court to be reviewed was entered on December 13, 1948, and order denying our petition for rehearing was entered on the same date. (R. 138, 139). Pursuant to title 28, U. S. Code, sec. 2101, par. (c), an order was entered on February 28, 1949, by one of the Associate Justices of this Court extending the time for filing this petition for writ of certiorari to and including April 12, 1949. (R. 141).

The jurisdiction of this Court is also invoked under paragraph 5 (a) of Rule 38 of this Court.

QUESTIONS PRESENTED

The principal questions presented herein are:

1. Where petitioners in California sold patented hop picking machines to residents of the state of Washington, and in California executed written license contracts providing for the annual payment to petitioners of certain patent royalties for the use thereof, can the State of Washington lawfully tax such royalties without infringing the Commerce Clause of the Federal Constitution?

2. Are such patent royalties income from intangible

property which is legally taxable only in the state of the domicile of the patent holders under the law and the Due Process Clause of the Fourteenth Amendment of the Constitution?

3. Where patented hop picking machines were sold and the full agreed purchase price paid and title thereto passed to the purchasers pursuant to written contracts, which also provided that the seller granted a license to the purchaser for the use thereof, and in consideration thereof the purchaser agreed to pay an annual royalty for such use over a period of years according to the quantity of hops picked with such machine, and the contracts were made in good faith without fraudulent intent to evade, do such royalties constitute part of the selling price so as to be taxable under a state sales tax measured by 3% of the selling price?

4. Where the patentee partners resided and had their sole office and place of business in California, and no office, place of business or authorized agent in Washington, and all contracts for the sale and licensing of patented hop picking machines to residents of Washington were always entered into by the sellers solely in California, and due to war conditions during the years in question there was no solicitation of sales in Washington and none necessary, as the demand greatly exceeded the available supply, were

said patentees doing business in Washington so as to be subject to a local sales tax on such interstate commerce transactions?

REASONS FOR ALLOWANCE OF WRIT

The following reasons are relied on by the petitioners for the allowance of the writ of certiorari herein, pursuant to paragraph 5 (a) of Rule 38 of this Court:

1. That the state court of last resort has decided federal questions of substance, which, unless the decisions hereinafter cited are deemed controlling, have not been heretofore directly determined by this Court.

Each of the four questions presented, hereinabove mentioned, is, we submit, a federal question of substance. Each of them is of substantial public importance. So far as we are aware, this Court has never previously directly determined any of the foregoing questions, and particularly the first three questions hereinabove mentioned. These questions are of sufficient public importance that they should now be directly determined by this Court herein.

State taxation of royalties received from federal patents, and state taxation of interstate commerce transactions, especially outside of the state of the taxpayer's domicile, as well as the question whether under these circumstances petitioners were doing business in the State of

Washington—each of these is, we submit, a federal question of substance and of substantial public importance in the administration of the law under our dual federal system of government.

This is undoubtedly correct as to each and all of the four questions presented, hereinabove mentioned, unless it be considered that the decisions of this Court hereinafter cited in our brief are controlling and decisive of these questions in favor of petitioners.

2. The state court of last resort has also (and we do not conceive this to be inconsistent) decided the said federal questions of substance in a way not in accord with applicable decisions of this Court, including the following cases:

Freeman v. Hewit, 329 U. S. 249, 91 L. Ed. 265; *McLeod v. Dilworth Co.*, 322 U. S. 327, 88 L. Ed. 1304; *Joseph v. Carter & W. Stevedoring Co.*, 330 U. S. 422, 91 L. Ed. 993; *Nippert v. Richmond*, 327 U. S. 416, 90 L. Ed. 760; *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. Ed. 956; *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90, 82 L. Ed. 68; *Gwinn, White & Prince v. Henneford*, 305 U. S. 434, 83 L. Ed. 272; *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. Ed. 1365; *First National Bank v. Maine*, 284 U. S. 312, 76 L.Ed. 313; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587; *Central Grey-*

hound Lines v. Mealey, 334 U. S. 653, 92 L. Ed. (Adv. Op.) 1235.

3. The state court of last resort has decided federal questions of substance in a way untenable, in conflict with the weight of authority, and contrary to the decisions of other courts, including the following cases:

Newport Co. v. Wisconsin Tax Commission, 219 Wis. 293, 261 N. W. 884, 100 A. L. R. 1204, cert. denied, 297 U. S. 720, 80 L. Ed. 1004; *State ex rel Cruse v. American Can Co.*, 117 Colo. 312, 186 P. 2d 779; *Standard Oil Co. v. Johnson*, 33 Cal. App. 2d 430, 92 P. 2d 470.

In the Newport case, the supreme court of Wiscossin reached a different conclusion from the Washington court and held that income from patents can be taxed only in the state of the patentee's domicile without infringing the Due Process Clause of the Constitution. This decision was approved by this Court by denial of certiorari.

4. The Washington Revenue Act of 1935 as amended, Laws of 1935, Ch. 180, Laws of 1939, Ch. 225, and Laws of 1941, Ch. 178, is unconstitutional, especially as applied to the petitioners, and repugnant to both the Commerce Clause and the Due Process Clause of the Constitution. The decision of the state supreme court was in favor of the validity of said state statute.

5. For the reason last hereinabove mentioned, the petitioners would have a right of appeal to this Court pursuant to title 28, U. S. Code, sec. 1257, par. (2). However, it seems to the petitioners preferable to come to this Court by certiorari in the belief that not only said two constitutional questions, but all four of the questions herein presented, as hereinabove stated, may be authoritatively and directly determined by this Court.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court directed to the Supreme Court of the State of Washington commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said state supreme court had in the case numbered and entitled on its docket No. 30281, Ed Thys and Albert K. Miller, co-partners doing business as Thys & Miller, respondents, vs. State of Washington, appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said state supreme court be reversed by this honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem proper.

ELWOOD HUTCHESON
GEORGE W. WILKINS
Attorneys for Petitioners

Supreme Court of the United States

October Term, 1948

No.....

ED THYS and ALBERT K. MILLER, co-partners doing business as THYS & MILLER,

Petitioners,

vs.

THE STATE OF WASHINGTON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the state supreme court is reported in 131 Wash. Dec. 689, 199 P. 2d 68; petition for rehearing denied, 132 Wash. Dec. 101. (R. 103-138).

JURISDICTION

The Court has jurisdiction to review the judgment here in question by writ of certiorari, pursuant to title 28, U. S. Code, sec. 1257, and particularly paragraph (3). As construed and applied herein by the state supreme court the state tax statute in question is invalid, unlawful, and

unconstitutional because repugnant to the Commerce Clause of the Constitution (Art. I, sec. 8, clause 3), and the Due Process Clause of the Fourteenth Amendment, and also the Patent Clause of the Constitution (Art. I, sec. 8, clause 8), and the federal patent statutes.

Also and in any event, the rights, privileges and immunities of the petitioners claimed under the said three constitutional provisions and laws are violated by the said state supreme court decision and judgment.

The judgment of the state supreme court to be reviewed was entered on December 13, 1948, and order denying our petition for rehearing was entered on the same date. (R. 138, 139). Pursuant to title 28, U. S. Code, sec. 2101, par. (c), an order was entered on February 28, 1949, by one of the Associate Justices of this Court extending the time for filing this petition for writ of certiorari to and including April 12, 1949. (R. 141).

The jurisdiction of this Court is also invoked under paragraph 5 (a) of Rule 38 of this Court.

The four questions presented, enumerated in the foregoing petition for certiorari, have been at all times directly raised by the petitioners in each of the said courts. Each of these questions was directly raised in each of the two notices of appeal and complaints filed by the petitioners at the inception of this proceeding. (R. 3, 4, 66, 67, 70-2).

The state supreme court decision shows that all of these questions, including the constitutional questions, were at all times directly raised and vigorously contended for by the petitioners. (R. 111, 112).

We therefore submit that the nature of the case and of the rulings in the court below were such as to bring this case directly within the said statutory jurisdictional provisions.

The cases believed to sustain such jurisdiction are as follows:

Charleston Fed. Sav. & Loan Assn. v. Alderson, 324 U. S. 182, 187; 89 L. Ed. 857, 862; *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697, 701, 89 L. Ed. 1296, 1306; *Joseph v. Carter & W. Stevedoring Co.*, 330 U. S. 422, 91 L. Ed. 993; *Citizens National Bank v. Durr*, 257 U. S. 99, 66 L. Ed. 149; *Ex Parte Williams*, 277 U. S. 267, 72 L. Ed. 877; *Ireland v. Woods*, 246 U. S. 323, 328, 62 L. Ed. 745, 749; *Fullerton v. Northern P. R. Co.*, 266 U. S. 435, 69 L. Ed. 367.

Federal questions of substance are presented.

American Sugar Ref. Co., v. Louisiana, 179 U. S. 89, 45 L. Ed. 102; *Tregea v. Modesto Irrigation Dist.*, 164 U. S. 179, 41 L. Ed. 395; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Illinois C. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622.

STATEMENT OF THE CASE

This has already been stated in the preceding petition, and the same is hereby adopted, incorporated by reference herein, and made a part of this brief.

SPECIFICATION OF ERRORS

1. The state supreme court erred in holding that the State of Washington may lawfully tax petitioners' patent royalties on hop picking machines sold to residents of Washington by the petitioners in California without infringing the Commerce Clause of the Constitution.

2. The state supreme court erred in holding that such patent royalties are not income from intangible property and are not legally taxable only in the state of the patent holders' domicile, under the Due Process Clause of the Constitution.

3. The state supreme court erred in holding that these patent royalties constitute part of the selling price of the hop picking machines, and are therefore taxable under the state sales tax, and business and occupation tax, measured by 3% and ¼% of the selling price, respectively.

4. The state supreme court erred in holding that the petitioners were and are doing business in the State of Washington, and therefore are subject to payment of state

sales taxes and business and occupation taxes in that state on these patent royalties.

5. The state supreme court erred in entering its judgment reversing the judgment of the superior court of Thurston County, Washington. (R. 138-9).

6. The state supreme court erred in denying our petition for rehearing. (R. 138).

7. The state supreme court erred in holdinv said state tax statute constitutional.

ARGUMENT

SUMMARY OF THE ARGUMENT

1. Where the petitioners in California sold patented hop picking machines to residents of the State of Washington, and in California executed written license contracts providing for the annual payment of certain royalties for the use thereof, the State of Washington may not lawfully tax such royalties without infringing the Commerce Clause of the Federal Constitution.

2. Such patent royalties are income from intangible property, and therefore are legally taxable only in the state of the patent-holder's domicile, under the Due Process Clause of the Fourteenth Amendment of the Constitution.

3. Where patented hop picking machines were sold

and the full agreed selling price was paid and the title passed to the purchasers pursuant to written contracts which also provided that the seller granted a license to the purchasers for the use thereof and in consideration thereof the purchasers agreed to pay an annual royalty for such use over a period of years according to the quantities of hops picked with such machine, and the contracts were made in good faith and without fraudulent intent to evade, such patent royalties do not constitute part of the selling price so as to be taxable under a state sales tax and business and occupation tax measured by 3% and ¼% respectively of the selling price.

4. Where the patentee partners resided and had their sole office and place of business in California and no office, place of business or authorized agent in Washington, and all contracts for the sale and licensing of patented hop picking machines to residents of Washington were always entered into by said sellers solely in California, and due to war conditions during the years in question there was no solicitation of sales in Washington, and none necessary, as the demand greatly exceeded the available supply, said patentees were not doing business in the State of Washington so as to be subject to a local sales tax or business tax on such interstate transactions.

1. THESE TAXES ARE AN ILLEGAL AND UNCONSTITUTIONAL IMPOSITION UPON INTERSTATE COMMERCE

Irrespective of whether these payments be deemed patent royalties, as we contend, or part of the selling price, we submit that the State of Washington by imposing this state sales tax and business tax thereon infringed the petitioners' constitutional rights under the .Commerce Clause (Art. I, sec. 8, clause 3) of the Federal Constitution. This tax is an unlawful burden which the state is attempting to impose upon interstate commerce transactions. Each of these dual sales and license-royalty contracts was in all instances executed by the petitioners at their sole office in Sacramento, California. (R. 20-1, 44, 86, 93). Each written contract was executed by the petitioners in California and crossed the state line and legally was as much a sale and license contract in interstate commerce as though the machines themselves were shipped across the state line.

Even though the completed machines themselves did not cross the state line, these were clearly interstate commerce transactions whereby *the petitioners in California sold these machines* to hop growers in Washington.

Moreover, substantial parts (over 15 %) of the machines were manufactured by petitioners at their Sacra-

mento plant and shipped from California to the Lindeman plant at Yakima, Washington, where they became component parts of the finished machines. (R. 14-6, 29, 33, 36-7, 39-42, 47, 88, 91-2). Thereafter said hop growers annually paid patent royalties thereon to petitioners, who received the same at their Sacramento, California, office. Manifestly, therefore, these were transactions in interstate commerce, the gross proceeds of which can be directly taxed only by Congress and not by the State of Washington.

This legal question is a federal question of substance, and unless the cases hereinafter cited are deemed controlling in favor of petitioners, has not heretofore been directly determined by this Court. It is a question of substantial public importance in the field of state taxation of interstate commerce transactions. It is a question which should be directly determined by this court.

Moreover we submit that the state supreme court decision is not in accord with applicable decisions of this Court.

In three previous cases this Court reversed the state supreme court of Washington and held that this same state tax statute is unconstitutional under the Commerce Clause. This should now be done for the fourth time in this case.

In *Fisher's Blend Station v. Tax Commission,* 297 U. S. 650, 80 L. Ed. 956, reversing 182 Wash. 163, 45 P. 2d 942,

49 P. 2d 1151, this Court held this same tax on a radio broadcasting station is unconstitutional under the Commerce Clause, and that sending "electro-magnetic waves" between states constitutes interstate commerce, even though all of the sounds of the radio programs were produced not by the station but by its customers, citing and following among other cases *Van Dusen v. Dept. of Labor and Industries*, 158 Wash. 414, 290 Pac. 803. Justice Stone, speaking for this Court, said:

> "In all essentials this procedure does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce. (Citing cases.) . . . Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, 'the ether,' is immaterial, in the light of those practical considerations which have dictated the conclusions that *the transmission of information interstate is a form of 'intercourse,' which is commerce. . . . As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce.*" (Citing cases). (All italics are ours).

In *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 82 L. Ed. 68, reversing 189 Wash. 131, 63 P. 2d 532, this Court made the same holding as to this tax on gross receipts of a stevedoring company engaged in locally loading and unloading cargos for interstate shipments. Justice Cardozo, speaking for this Court, said:

"The business of loading and unloading, being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts." (Citing numerous cases).

Again in *Gwinn, White & Prince v. Henneford,* 305 U. S. 434, 83 L. Ed. 272, reversing 193 Wash. 451, 75 P. 2d 1017, this Court made this same holding as to this same tax on the gross receipts of the business of marketing fruit. Justice Stone, speaking for this Court, said:

"But it is enough for present purposes that under the Commerce Clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce *or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce* which extend beyond the territorial limits of the taxing state. Such a tax . . . burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject. . . The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." (Citing cases).

Now for the fourth time this Court should make the same holding as to the same tax directly applied to the gross receipts of the petitioners' interstate business.

In *McLeod v. Dilworth Co.*, 322 U. S. 327, 88 L. Ed. 1304, this Court held that imposition of the Arkansas sales tax upon sales of a Tennessee company to purchasers in Arkansas was unconstitutional in violation of the Commerce Clause, saying:

> "In this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction. . . In view of the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us . . . involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the State."

In *Freeman v. Hewit*, 329 U. S. 249, 91 L. Ed. 265, this Court held that an Indiana tax on interstate sales of intangible securities infringed the Commerce Clause. Justice Frankfurter, speaking for this Court, said:

> "A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. . .
>
> "It cannot justify what amounts to a levy upon the very

process of commerce across State lines by pointing to a similar hobble on its local trade. . .

"And where, as in this case, the commodities subsequently sold interstate are securities, they can be reached by property tax *by the State of domicile of the owner. Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15, 19, 79 L. Ed. 171, 174; 55 S. Ct. 12; and see *Citizens Nat. Bank v. Durr*, 257 U. S. 99, 66 L. Ed. 149, 42 S. Ct 15. . . .

"An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. *What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce. . .*

"The tax on the sale itself cannot be differentiated from the direct unapportioned tax on gross receipts, which has been definitely held beyond the State taxing power ever since *Fargo v. Michigan. . .*

"There remains only the claim that an interstate sale of intangibles differs from an interstate sale of tangibles in respects material to the issue in this case. . . *Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper worth $65,214.20, rather than machines.*"

In the very recent case of *Central Greyhound Lines v. Mealey*, 334 U. S. 653, 92 L. Ed. (Adv. Op.) 1235, this Court held unconstitutional under the Commerce Clause a New York State tax on the gross receipts of a bus company passing through New Jersey and Pennsylvania while going between two points in New York, even though the

state court did not directly decide the constitutional question. Justice Frankfurter, speakinp for this Court. said:

> "The vice of such a tax is that it lays 'a direct burden upon every transaction in interstate commerce by withholding, for the use of the state, a part of every dollar received in such transaction.'" (Citing cases).

In *Joseph v. Carter & W. Stevedoring Co.*, 330 U. S. 422, 91 L. Ed. 993, this Court followed and reaffirmed *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90, 82 L. Ed. 68, *supra*, and held such a tax on the gross receipts of a stevedoring company is unconstitutional. Justice Reed, speaking for this Court, said:

> "Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. . . Stevedoring, we conclude, is essentially *a part of the commerce itself* and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. . . Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. . . The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

See also to the same effect:

Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 L. Ed. 1365; *Baldwin v. Seelig*, 294 U. S. 511, 79 L. Ed. 1032; *Nippert v.*

Richmond, 327 U. S. 416, 90 L. Ed. 760; *Toomer v. Witsell*, 334 U. S. 385, 92 L. Ed. (Adv. Op.) 1131; *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 153, 62 L. Ed. 632, 636; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. Ed. 295; *Best & Co. v. Maxwell*, 311 U. S. 454, 85 L. Ed. 275; *State ex rel Cruse v. American Can Co.*, 117 Colo. 312, 186 P. 2d 779.

The business of the petitioners in executing in California these written sales and license-royalty contracts and transmitting the same by mail to the purchasers in Washington, *constitutes interstate commerce.*

As stated by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189, 6 L. Ed. 23, 68:

> *"Commerce is undoubtedly traffic; but it is something more—it is intercourse."*

In *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, 88 L. Ed. 1440, this Court held that insurance contracts executed by residents of different states constitute interstate commerce and come with the Commerce Clause of the Constitution, saying:

> "One reason advanced for the rule in the Paul case has been that insurance policies 'are not commodities to be shipped or forwarded from one state to another.' But both before and since *Paul v. Virginia* this Court has held that *Congress can regulate traffic though it consists of intangibles.*"

In *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 82 L. Ed. 954, Chief Justice Hughes, speaking for this Court, said:

> "There is no question that petitioner was directly and largely engaged in interstate and foreign commerce. We have often decided that *sales to purchasers in another state* are not withdrawn from federal control because the goods are delivered f.o.b. at stated points within the state of origin for transportation." (Citing cases).

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. Ed. 239, this Court said:

> "*Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse.*"

See also to the same effect:

Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 80 L. Ed. 956, *supra; Freeman v. Hewit*, 329 U. S. 249, 91 L. Ed. 265, *supra; International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. Ed. 678; *Lemke v. Farmer's Grain Co.*, 258 U. S. 50, 66 L. Ed. 458; *U. S. v. Reading Co.*, 226 U. S. 324, 57 L. Ed. 243; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 66 L. Ed. 234; *Standard Oil Co. v. Johnson*, 33 Cal. App. 2d 430, 92 P. 2d 470; *15 C. J. S.* 257, sec. 1.

2. PATENT ROYALTIES ARE INCOME FROM INTANGIBLE PROPERTY AND TAXABLE ONLY IN STATE OF PATENTEE'S DOMICILE

It is undisputed that the domicile of the petitioners is in California. Patent royalties constitute income from patents which are intangible property. To tax the same, as in this case, outside of the state of the patentee's domicile is to extend the vicious evil of illegal double or multiple taxation and deprives the petitioners of their liberty and property without due process of law in violation of the Fourteenth Amendment of the Constitution. The situs of intangible property for tax purposes is the domicile of the owner under the well settled principle of *mobilia sequunter personam.*

This Court has repeatedly adhered to these principles as to intangible property such as stocks and bonds and and income therefrom.

Farmer's Loan & Trust Co. v. Minnesota, 280 U. S. 204, 74 L. Ed. 371; *Beidler v. South Carolina Tax Commission,* 282 U. S. 1, 75 L. Ed. 131; *Baldwin v. Missouri,* 281 U. S. 586, 74 L. Ed. 1056; *First National Bank v. Maine,* 284 U. S. 312, 76 L. Ed. 313.

This principle was recognized in *Suburban Transp. System v. King County,* 160 Wash. 364, 295 Pac. 124, quoting 26 R.C.L. 273, and in *Pacific Cold Storage Co. v. Pierce County,* 85 Wash. 626, 149 Pac. 34.

A case directly in point is *Newport Co. v. Wisconsin Tax Commission*, 219 Wis. 293, 261 N. W. 884, 100 A.L.R. 1204. It was approved by this Court by denial of certiorari in *Wisconsin Tax Commission v. Newport Co.*, 297 U. S. 720, 80 L. Ed. 1004. The Court held that the State of Wisconsin could not constitutionally under the Due Process Clause of the Constitution tax income derived from patent rights owned by the plaintiff, a Delaware corporation, even though it was licensed to do business in Wisconsin and the patented inventions were made through research at its Wisconsin manufacturing plant. That case was not as strong as this in favor of the taxpayer because here there is no question but that these inventions were made in California and not as a result of any research work or manufacturing activities in Washington. The Court quoted and followed the foregoing decisions of this Court, and said:

> "The difficulty is created by the fact that the discovery in this case culminated in the issuance of *letters patent*—in the creation of *intangible property* the income from which is by statute given a situs at the residence of the owner or recipient, and which is said by the United States supreme court to *have a situs at the domicile of the owner*. May this patent be treated, by reason of the place and circumstances of its discovery, as having a situs in Wisconsin? We think not. The taxpayer was not engaged in Wisconsin in the business of dealing in letters patent. *The intangible known as a patent had no more existence in Wisconsin* than any other intangible has existence at the loca-

tion of the tangible property to which it evidences rights."

See also *Freeman v. Hewit*, 329 U. S. 249, 91 L. Ed. 265, *supra*, and the cases there cited.

3. PATENT ROYALTIES ARE NOT PART OF THE SELLING PRICE.

In *Thys v. Rivard*, 25 Wn. 2d 345, 171 P. 2d 255, and 29 Wn. 2d 502, 187 P. 2d 652, an action to recover patent royalties under this same contract, the court recognized that these patent royalties were patent royalties and that the law of patents applied and governed the case. In this action, however, the court declined to recognize that principle.

There is a well established distinction between a royalty as compensation for a license for the use of a patented article and the selling price of a chattel, whether patented or unpatented. This distinction should be recognized in the field of taxation as elsewhere. These patent royalties were not part of the selling price, and the court seriously erred in holding that they were.

In each of these transactions title passed and the full selling price was paid when the machine was delivered to the purchaser. The purchaser acquired title, possession, and the right of possession. However, the machine em-

bodied the Thys patents, which gave petitioners *the exclusive right* to manufacture, sell, *and use* the same during the statutory seventeen-year period. It was for that reason that the license was issued. The royalty was merely compensation for the license or contractual right to use the patented machine.

The written agreement between petitioners and each of the machine purchasers (Pltf. Ex. 8) clearly shows that in fact the same contained two contracts in one instrument: (1) a contract for the sale of the machine and (2) a license contract for the use of patents embodied therein and an agreement to pay royalties to petitioners in consideration therefor.

A consideration of the contract, and particularly paragraphs 1, 3, 5 and 8 thereof, leaves no doubt but that title to the machine passed to the purchaser upon delivery. The full purchase price was always paid at or prior to delivery. The intention of the parties was clear that title passed to the purchaser at that time. A conditional sales contract was never signed or filed. There was no language or provision indicating any retention of title to the mahine by petitioners, either as security or otherwise.

Moreover obviously when a chattel is sold, it is necessary that the parties know the selling price thereof. If respondent were correct that the royalty were part of the

selling price, the parties could not know the amount of the selling price at the time of the sale or at the time of passing of title and delivery, for the reason that the royalty would vary, depending upon the quantity of hops picked thereby annually during a future seventeen year period. Under these circumstances we submit that it is absurd to contend that the royalties were part of the selling price.

Furthermore petitioners have paid and rightfully paid income tax based upon the royalty income. Certainly it would not be right that petitioners should have to pay income tax on the full amount of the royalties as such and yet that the same be considered part of the selling price, as gross proceeds of sale, of course, would not all constitute taxable income.

Also from the standpoint of the purchaser, if the royalty were part of the purchase price, it would be necessary to capitalize the same and the same could not be deducted as an operating expense. However, the royalty for the use of the hop picking machine is substantially the equivalent of payment to hand-labor for picking hops, and therefore should be considered an operating expense rather than a capital expenditure.

It is well settled that in construing tax statutes, all doubts are to be resolved against the government or state and the same are to be construed most strongly in favor

of the taxpayer. *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 76 L. Ed. 484; *Gould v. Gould*, 245 U. S. 151, 62 L. Ed. 211.

The Old Colony case also recognizes the well settled principle that the language of a tax statute should be given a fair and reasonable construction according to its plain and rational meaning. Applying these principles, the decision below was clearly erroneous.

The majority opinion does not cite any sustaining authority which has ever previously held that patent royalties are not patent royalties but are merely part of the selling price. So far as we are aware, no court has ever previously so held.

So zealously have the courts upheld the rights of inventors and patentees, pursuant to Art. I, sec. 8, clause 8, of the Constitution and the Federal Patent Statutes, title 35, U.S.C.A., sec. 31, et seq., that until 1932 *(Fox Film Corp. v. Doyal*, 286 U. S. 123, 76 L. Ed. 1010) it was settled law that no state could constitutionally under any circumstances tax patent royalties. See *Long v. Rockwood*, 277 U. S. 142, 72 L. Ed. 145, and cases there cited. Both the Fox and Long cases reognize that patent royalties are to be considered as such, and not as part of the selling price of a chattel.

In the *Five Per Cent Cases,* 110 U. S. 471, 478, 28 L. Ed. 198, this Court said:

> "A sale, in the ordinary sense of the word, is a transfer of property *for a fixed price* in money or its equivalent."

This has been many times quoted with approval, including *U. S. v. Benedict,* (CCA) 280 Fed. 76, 80; *Hale v. Helvering,* (CCA) 85 F. 2d 819; and *Estate of Edwin W. Rickenberg,* 11 T. C., decided July 7, 1948.

This royalty was payment for a license rather than a sale. *Arnold v. North American Chemical Co.,* 232 Mass. 196, 122 N. E. 283.

As stated by this Court in *Burnett v. Harmel,* 287 U. S. 103, 77 L. Ed. 199:

> "Moreover, the statute speaks of a 'sale' and these leases would not generally be described as a 'sale' of the mineral content of the soil, using the term either in its technical sense or as it is commonly understood. Nor would the payments made by lessee to lessor generally be denominated the purchase price of the oil and gas. By virtue of the lease, the lessee acquires the privilege of exploiting the land for the production of oil and gas for a prescribed period; he may explore, drill and produce oil and gas, if found. Such operations with respect to a mine have been said to resemble a manufacturing business carried on by the use of the soil, to which the passing of title of the minerals is but an incident, rather than a sale of the land or of any interest in it or in its mineral content. . .

> *"Such a construction . . . would have adopted a distorted, rather than the common meaning of the term 'sale,' . . .*
>
> "Bonus and royalties are both consideration for the lease and are income of the lessor. We cannot say that such payments by the lessee to the lessor, to be retained by him regardless of the production of any oil or gas, are any more to be taxed as capital gains than royalties which are measured by the actual production."

It is well settled that royalties are subject to the federal income tax as ordinary income and not as capital gains. *Burnet v. Harmel*, 287 U. S. 103, *supra*; *Estate of Ernest G. Hoffman*, 8 B. T. A. 1272, 1274; *Merten, Law of Federal Income Taxation*, vol. 3, p. 35, sec. 19.16, footnote 79, and vol. 8, p. 309, sec. 45.34; *Welder v. Commissioner*, (CCA) 148 F. 2d 583; *Zimbalist v. Anderson*, (CCA) 38 F. 2d 57; *Wood Process Co. v. Commissioner*, 2 T. C. 810, 816; *Sabatani v. Commissioner*, (CCA) 98 F. 2d 753; *General Motors Corp. v. Dailey*, (CCA) 93 F. 2d 938; *Commissioner v. Celanese Corp.*, (CCA) 140 F. 2d 339; *Cleveland Graphite Bronze Co. v. Commissioner*, 10 T. C. 974.

A contract to pay patent royalties may be lawfully combined with a contract for the sale of a patented machine, as was done here.

Porter Needle Co. v. National Needle Co., 17 Fed. 536; *Mitchell v. Hawley*, 16 Wall. 544; *Cold Metals Process Co.*

v. McLouth Steel Corp., 41 F. Supp. 487; *Schnack v. Applied Arts Corp.*, 283 Mich. 434, 278 N. W. 117; *Skee Ball Co. v. Cohen*, 286 Fed. 275; *Henry v. A. B. Dick Co.*, 224 U. S. 1, 56 L. Ed. 645, 654.

Transportation costs and similar charges paid by the purchaser are not part of the selling price. The same principle is applicable to these royalties.

Bloxom v. Henneford, 193 Wash. '540, 76 P. 2d 586; *Twaits v. State Tax Commission*, 106 Utah 343, 148 P. 2d 343; *Whitehill v. State Tax Commission*, 106 Utah 469, 150 P. 2d 370; *Dain Mfg. Co. v. State Tax Commission*, 237 Iowa 531, 22 N. W. 2d 786; and *Standard Oil Co. v. State Tax Commissioner*, 71 N. D. 146, 299 N. W. 447, 135 A. L. R. 1481.

4. PETITIONERS WERE NOT DOING BUSINESS IN WASHINGTON

It is undisputed that the petitioners did not reside or have any office, place of business, stock of merchandise, or authorized agent in Washington. Under the repeated decisions of this Court, they were not doing business there and were not subject to local taxation there.

People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 62 L. Ed. 587; *Minnesota Commercial Men's Assn. v. Benn*, 261 U. S. 140, 67 L. Ed. 573; *Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710; *Green v. C.*

B. & Q. R. Co., 205 U. S. 530, 51 L. Ed. 916; *Cheney v. Massachusetts*, 246 U. S. 147, 63 L. Ed. 632; *Bank of America v. Whitney*, 261 U. S. 171, 67 L. Ed. 594; *District of Columbia v. H. D. Lee Co.*, 161 F. 2d 646, cert. denied, 332 U. S. 760.

Petitioners had no control over the business of Lindeman Equipment Company, and the latter was an independent contractor and not an agent. *Chicago R. I. R. Co., v. Bond*, 240 U. S. 449, 60 L. Ed. 735; *Casement v. Brown*, 148 U. S. 615, 37 L. Ed. 532; *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 37 L. Ed. 223.

CONCLUSION

We therefore respectfully submit that not only is the decision below clearly erroneous, but also the same is of such nature that it should be reviewed and reversed in the proper exercise of the supervisory powers of this Court. The great national evils of interference with and obstruction to the free flow of interstate commerce transactions by the several states, double and multiple taxation of citizens, especially by states other than the domicile, interference by the states with the lawful constitutional rights of federal patent-holders—these evils will be promoted rather than retarded if this erroneous decision were to stand.

These are federal questions of substance and of great

public importance. The law should now be properly and authoritatively defined by this Court herein. The subject of state taxation of interstate commerce transactions should not be permitted to remain in its present confused condition. The highly salutary flow of free trade across state lines should not be subjected to multitudinous state tariffs. Washington should not be permitted to impose upon petitioners a tax for the privilege of engaging in interstate commerce between California and Washington—a right guaranteed to them under the Constitution. The issue is now directly presented to this Court, and its proper adjudication now will prevent similar future errors.

One of the tremendously important aims of our Federal Constitution and laws is to encourage invention and scientific and industrial progress by protecting the rights of patent-holders. Also the Commerce Clause and the Due Process Clause are the primary cornerstones of our constitutional structure. Preserving them inviolate and preserving the immunity of such interstate commerce from the burdens of state taxation, as contemplated by the Constitution, is, we believe, one of the high responsibilities of this honorable Court. The decision of the court below is an important step in the wrong direction. It is contrary to numerous decisions of this Court. It is unsound and opposed to the weight of authority. The same should not be permitted to stand.

Petitioners undoubtedly have a right to bring the case to this Court by an appeal as to the (first two) constitutional questions. We submit that this Court should grant certiorari in order that all four of these important legal questions may be authoritatively determined by this Court.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

Respectfully submitted,

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APPENDIX — STATE TAX STATUTE

The material portions of the state tax statute, namely, Titles II and III of the Revenue Act of 1935 (chap. 180) as amended by Laws of 1941, chap. 178 (Remington's Revised Statutes of Washington, 1941 Supplement, sections 8370-4 to 8370-25, and 8370-199, as amended) are as follows:

Rem. 1941 Supp. sec. 8370-4 reads in part as follows:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: . . .

"(b) Upon every person engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-quarter of one per cent;

"The measure of the tax is the value of the products so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state;

"(c) Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one per cent; . . .

"(e) Upon every person except persons taxable under

subsection (d) above engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent; . . .

Laws of 1941, chapter 178, §2, p. 482 (Rem. Supp. 1941, §8370-5 (P. P. C. §965-3), provides, *inter alia*:

"For the purposes of this title, unless otherwise required by the context: . . .

"(c) The word 'sale' means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a 'sale at retail' or 'retail sale' under sub-section (d) of this section. It includes conditional sale contracts, leases with option to purchase, and any other contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It shall also be construed to include the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not; . . .

"(f) The term 'gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses; . . .

"(h) The terms 'value proceeding or accruing' means the consideration, whether money, credits, rights or other property expressed in terms of money, actually received or accrued. The term shall be applied, in each

case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer. The Tax Commission may provide by regulation that the value proceeding or accruing from sales on the installment plan under conditional contracts of sale may be reported as of the dates when the payments become due; . . .

"(j) The word 'manufacturer' means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or commercial use from his own materials or ingredients any articles, substances or commodities. When the owner of equipment or facilities furnishes, or sells to the customer prior to manufacture, all or a portion of the materials that become a part or whole of the manufactured article, the Tax Commission shall prescribe equitable rules for determining tax liability;

"(k) The term 'to manufacture' embraces all activities of a commercial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful article of tangible personal property or substance of trade or commerce is produced and shall include the production or fabrication of special made or custom made articles; . . ."

"(m) The word 'business' includes all activities engaged in with the object of gain, benefit or advantage to the taxpayer or to another person or class, directly or indirectly;

"(n) The term 'engaging in business' means commencing, conducting or continuing in business and also the exercise of corporate or franchise powers, as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business;"

"From and after the 1st day of May 1941, there is hereby levied and there shall be collected a tax on each *retail sale in this state* equal to three per cent of *the selling price.*" (sec. 8370-16).

"For the purposes of this title, unless otherwise required by the context:

"(a) The term 'selling price' means the consideration, whether money, credits, rights, or other property, expressed in the terms of money, paid or delivered by a buyer to a seller, and without any deduction on account of the cost of tangible property sold, the cost of the materials used, labor costs, interest, discount, delivery costs, taxes or any other expenses whatsoever paid or accrued and without any deduction on account of losses;" (sec. 8370-17).

"In the case of installment sales and leases with an option to purchase, the Commission, by regulation, may provide for the collection of taxes upon the installments of the purchase price, or amount of rental, as of the time the same fall due.

"In case the consideration for the lease with an option to purchase is not a bona fide consideration or does not represent a reasonable charge therefor, or if the agreement designated as a lease with an option to purchase is in fact not a true lease with an option to purchase, the Tax Commission shall issue equitable rules and regulations for the proper classification of such transaction.

"The Tax Commission, by general regulation, may provide that a taxpayer whose regular books of account are kept on a cash receipt basis may file returns based upon his cash receipts for each bi-monthly period and pay the tax herein provided upon such basis in lieu

of reporting and paying the tax on all sales made during such period." (Sec. 8370-25).

"Any person . . . having paid any tax as required by this act and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston County, within one year after the payment of such tax, or within thirty days after the date of the notice denying such a hearing or after the date of the order provided in this section. In the appeal the taxpayer shall set forth the amount of the tax imposed upon him, which he concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the Tax Commission within the time provided and by filing the original thereof with proof of service with the clerk of the superior court of Thurston County. . . . The trial in the superior court on the appeal shall be *de novo* and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by him is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the State of Washington, the defendant; and both parties shall be entitled to subpoena and require the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant and material to determine the correct amount of the tax that should be paid by the taxpayer under this act. Either party shall be allowed to appeal to the supreme court in the same manner as other civil actions are appealed to that court. It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the Tax Commissioner for a hearing in order to appeal to the superior court, as herein provided; but no court action or proceeding of any kind shall be maintained

by the taxpayer to recover any tax paid, or any part thereof, except as herein provided." (Rem. Rev. Stat., Supp., sec. 8370-199, as amended by Laws of 1939, chap. 225, sec. 29).